BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

WILLIAM L. SANDERS	)	
Claimant	)	
VS.	)	
	)	Docket No. 250,765
LLOYD MURDOCK CONSTRUCTION, INC.	)	
Respondent	)	
AND	)	
	)	
CLARENDON NATIONAL INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent appealed the February 23, 2000 preliminary hearing Order entered by Administrative Law Judge Steven J. Howard.

ISSUES

Claimant alleges that he sustained injuries to both shoulders while working for the respondent as a rough-in carpenter. Respondent admits claimant injured his right shoulder at work in December 1998 and that respondent had actual notice of this accident. But, respondent denies claimant's left shoulder condition is work related and that timely notice of that injury was given. Apparently finding that claimant's left shoulder injury was caused by work activities and that proper notice was given, the Judge granted claimant's request for benefits.

Respondent also contends Judge Howard erred by designating claimant's IME doctor as the authorized treating physician without first giving respondent an opportunity to submit the names of three physicians from which claimant could choose a physician.

The issues before the Board on this appeal are whether claimant's left shoulder injury was caused or contributed to by the work performed for the respondent; whether notice was timely given; and, whether the ALJ exceeded his jurisdiction in naming Dr. Harris as the authorized physician.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the file compiled to date, the Appeals Board finds:

The preliminary hearing Order should be affirmed.

Claimant has worked for the respondent as a rough-in carpenter since about April of 1993. Claimant was injured initially in late November 1998 when he fell between two ceiling joists, catching himself underneath his arms. He continued working but was having difficulty raising his arms and was experiencing pain in his shoulders. He experienced a second accident in early December 1998 lifting beams with his supervisor, Mr. Murdock. Respondent admits notice of this accident, but contends it fails to satisfy the requirements of the statute[1] as to the left shoulder injury because claimant only voiced complaints about his right shoulder at that time. The notice required, however, is notice of accident, not notice of injury. Here respondent was given notice that an accident had occurred and respondent properly responded by providing medical treatment for the injury. The fact that the full nature and extent of the injury was not known does not defeat the claim. Nevertheless, claimant must still prove that his left shoulder injury arose out of and in the course of his employment.

Claimant first sought medical treatment on his own with Dr. Brooks. Shortly thereafter, claimant was sent to Dr. Keith D. Sheffer by respondent's workers compensation insurance carrier. Dr. Sheffer in turn referred claimant to Dr. Thomas P. Phillips who performed surgery on claimant's right shoulder on February 17, 1999. Afterwards, claimant received physical therapy which aggravated his left shoulder symptoms. He reported this to Dr. Phillips who ordered an MRI which showed a tear of the left rotator cuff. Claimant is not certain whether this was the first time he mentioned the left shoulder to Dr. Phillips, but admits he did not mention his left shoulder to Dr. Brooks or to Dr. Sheffer.

For purposes of preliminary hearing, the Appeals Board affirms the Judge's finding that claimant's work activities caused or contributed to the bilateral shoulder injuries. That conclusion is supported by the expert medical opinions of the treating physician, Dr. Phillips, and of orthopedic surgeon Dr. Lanny W. Harris, who saw claimant on one occasion on August 3, 1999, who likewise believes claimant's left shoulder condition is a work-related injury. There is no expert medical opinion to the contrary. At this point, the Board finds the opinions of Drs. Phillips and Harris more persuasive than the inconsistencies and other contrary evidence respondent points to in the record.

Claimant's left shoulder injury may not have been caused solely by the specific accidents described, but also by the heavy work he performed for respondent on a daily basis. An injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.[2] The test is not whether the accident caused the condition, but whether the accident aggravated or accelerated a preexisting condition.[3] Likewise, a subsequent aggravation during physical therapy is

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[1] K.S.A. 44-520.

[2] Odell v. Unified School District, 206 Kan. 752, 481 P.2d 974 (1971).

[3] Woodward v. Beech Aircraft Corp., 24 Kan. App. 2d 510, 949 P.2d 1149 (1997).

compensable as a direct and natural consequence of the original injury and separate notice of accident is not required.[4]

Workers have the burden of proof to establish their rights to compensation and to prove the various conditions upon which those rights depend.[5]

"Burden of proof" means the burden to persuade by a preponderance of the credible evidence that a party's position on an issue is more probably true than not when considering the whole record.[6]

Based on the record presented to date, claimant has proven that he injured himself while working for the respondent and that respondent had timely notice of the accident.

Finally, the Appeals Board has held on many previous occasions, and continues to hold, that an administrative law judge does not exceed his jurisdiction by naming an authorized treating physician without first giving respondent the opportunity to submit to claimant a list of three names from which to choose.[7] Accordingly, this is not an issue which the Board can review on an appeal from a preliminary hearing order.

As provided by the Workers Compensation Act, preliminary hearing findings are not binding but are subject to modification upon a full hearing of the claim.[8]

WHEREFORE, the Appeals Board affirms the February 23, 2000 preliminary hearing Order entered by Judge Howard.

IT IS SO ORDERED.

Dated this ____ day of May 2000.

BOARD MEMBER

c: Kip A. Kubin, Overland Park, KS
Jeffrey E. King, Salina, KS

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[4] Frazier v. Mid-West Painting, Inc., Docket No, 79,833 (Kan. 2000).

[5] K.S.A. 1998 Supp. 44-501(a).

[6] K.S.A. 1998 Supp. 44-508(g).

[7] *See* e.g. DeHart v. Core Carrier Corp., WCAB Docket No. 230,758 (Oct. 1998).

[8] K.S.A. 1999 Supp. 44-534a(a)(2).

Steven J. Howard, Administrative Law Judge
Philip S. Harness, Director